SOME OBSERVATIONS ON THE APPLICATION OF THE DOCTRINE OF LAST CLEAR CHANCE.

The application by the various courts of the doctrine of the last clear chance to the particular facts presented by each case, has caused some confusion as to the real meaning of this principle. As a consequence it is difficult to reconcile all of the cases on the subject by the application of any fixed rule.

No consideration of this doctrine can be rightly entered into without an examination of the rule of contributory negligence. The rule that contributory negligence will defeat recovery in negligence cases appears to have been first distinctly announced in the case of Butterfield *v.* Forrester,[1] though not then as a novel doctrine. There the defendant, for the purpose of making some repair to his house, which was close by the roadside, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. The plaintiff, about candle light, but while there was yet light enough left to discern the obstruction at 100 yards distance, while riding very rapidly, rode against the pole and was thrown and badly hurt. The Court directed a jury, that "if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant." This charge was sustained on appeal.[2]

This doctrine, thus first enunciated in a most reasonable form was soon carried beyond what could ever have been contemplated by the original case. At length some courts held that any negligence on the part of the plaintiff which in any degree contributed to an accident was the proximate cause thereof, and constituted contributory negligence which barred recovery. It was further held in some cases that plaintiff must not only prove the negligence of the defendant, but must also affirmatively disprove any negligence on his part. Carried to such extremes, the

1. Butterfield *v.* Forrester, 11 East 60, 10 Revised Rep. 433.

2. For definitions of contributory negligence see 29 cyc. 505; 1 Sherman & Redf, Neg. (6th ed.) § 61. 1 Thomp. Neg. 2d ed. § 169.

doctrine became the subject of severe condemnation as a harsh and unjust rule, as it left the plaintiff to bear all the damages, although he may have been but remotely, and consequently, but slightly in fault.

The existence of these conditions, and especially in cases where human life was concerned, created a need for a more just and humane rule, and accounts for the prompt and general approval given to the doctrine now generally known as the "Last Clear Chance," or as it is sometimes referred to as the rule of antecedent and subsequent negligence.

The case of Davies *v.* Mann [3] is generally considered to be the case from which the above doctrine originated. In that case the owner of a donkey negligently turned it out upon the highway with its feet fettered, and the animal was killed by a party who was carelessly driving along the highway and ran into it. A recovery was allowed notwithstanding the negligence of the owner. In that case Lord Abinger, C. B., said: "The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there. But even were it otherwise, it would have made no difference for as the defendant might, by proper care have avoided injuring the animal, and did not, he is liable for the consequences of his negligence though the animal might have been improperly there." And in the same case, Parke, B. says: "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

The doctrine of the above case has been stated to be that "the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it."[4] Another legal writer [5] in describing

3. Davies *v.* Mann, 10 Mees & W. 546, 12 L. J. Exch. N. S.; 10, 6 Jur. 954, 19 Eng. Rul. Cas. 190.
4. Law Quarterly Review, p. 507.
5. Pattersons Railway Accident Law, 55.

the rule as set out in the above case says, "It means only that negligence upon the part of plaintiff which bars his recovery from the defendant must have been a proximate cause of the injury, and that it is not a proximate, but only a remote cause of the injury when the defendant notwithstanding the plaintiff's negligence, might, by the exercise of ordinary care and skill, have avoided the doing of the injury."

Mr. Beach, after considering the subject at some length, is of the opinion, that the following principles cover every case in which a correct application has been made of the rule of Davies *v.* Mann: "(a) When the plaintiff's negligence is only a remote cause of the injury he sustains, it is not contributory negligence, and he may recover; and (b) contributory negligence is no bar to an action for willful injury." [6]

The clear modern doctrine is that, in order to constitute such negligence as will bar a recovery of damages, these two elements must in every case concur: (a) A want of ordinary care on the part of the plaintiff, or, where the action is for damages, resulting in death, a want of ordinary care on the part of the person killed; (b) a proximate connection between this want of ordinary care and the injury complained of. When this definition is kept in mind it will be seen that the rule as asserted in Davies *v.* Mann, i. e., of the last clear chance, is not in conflict with the rule asserted first in Butterfield *v.* Forrester, i. e., of contributory negligence, but that the rule of the former case is rather a just extension of the latter's underlying principles.

Nor is the doctrine of the last clear chance, an exception to the rule that contributory negligence bars a recovery, unless the injury is wanton or willfully inflicted. Its proper application does not permit an injured person to recover in spite of negligence on his part contributing to the injury but it does permit a recovery notwithstanding a want of due care on the part of the plaintiff, in cases where the facts are such that it may be said that the plaintiff's want of due care was not the proximate cause of the injury. Evidence to which this rule of law is applicable does not tend to prove that the injured party used due care,

6. Beach, Contrib. Neg., § 28. See, also, Sherman & Redf. Neg., § 99; 66 Cent. L. J. 215; 79 Cent. L. J. 352.

but it does tend to prove that such want of due care on the part of the plaintiff was not the proximate cause of the injury, and that the injury was caused solely by the failure of the defendant to take advantage of the last clear chance of avoiding the injury.[7] As tersely stated by one Court "it is simply a means of determining whether the plaintiff's negligence is a remote or a proximate cause of the injury." [8]

In the application of this doctrine, it must be borne in mind that it presupposes the existence and breach of a duty on the part of the defendant; and it cannot itself be properly invoked for the purpose of raising such a duty. The determination of the question as to whether any duty exists which has been violated, logically precedes any consideration of the applicability of the doctrine of last clear chance, and is of the nature of a condition precedent to the consideration of that doctrine. If for example, a trespasser on a railroad track is struck by a train, and it appears that the employees in charge of the train did not see him, but that they might have seen him if they had kept a lookout, the question immediately arises whether the railroad company owed any duty to keep a lookout for trespassers.[9]

If under the decision of that state no such duty was incumbent upon the railroad company, and there was no other breach of duty on its part, the question as to the applicability of the doctrine of last clear chance could not properly arise, for if the defendant was free from negligence then it would not be liable even if the plaintiff was entirely free from fault.[10]

When, however, a breach of duty on defendant's part, operating as a proximate cause of the injury, is established independently, and it further appears that plaintiff or deceased

---

7. Smith *v.* Norfolk, etc., R. Co., 14 N. C. 728, 19 S. E. 863, 25 L. R. A. 287; Indianapolis Trac. etc., Co. *v.* Croly, 54 Ind. App. 566; Button *v.* Hudson River R. Co., 18 N. Y. 248; Nashua Iron, etc., Co. *v.* Worcester, etc., R. Co., 62 N. H. 159; Tanner *v.* Louisville, etc., R. Co., 60 Ala. 621.

8. Smith *v.* Norfolk, etc., R. Co., 114 N. C. 728, 25 L. R. A. 287, 19 S. E. 863.

9. See note to Frye *v.* St. Louis, I. M. & S. R. Co., 8 L. R. A. (N. S.) 1069.

10. See note to Southern R. Co. *v.* Bailey, 27 L. R. A. (N. S.) pg. 381.

was guilty of antecedent negligence in getting into a position of peril, so that under the ordinary rule he would be chargeable with contributory negligence, the question arises whether he may be relieved of the operation of that general doctrine by the application of the doctrine of last clear chance; and it is not until this point is reached that the question whether the antecedent negligence of plaintiff or decedent continued until the instance of the impact is material.

The doctrine of last clear chance applies only to cases where the defendant's opportunity of preventing the inquiry by the exercise of due care, was later in point of time than that of the plaintiff. This is a rule of universal application and it affords the test of the applicability of the doctrine to a particular case. As a sort of corollary to this rule, the courts have stated as a general proposition, that, where the person injured has negligently exposed himself to the injury, he cannot recover on account of the negligence of the defendant by an application of this doctrine, unless it appears that the defendant's negligence intervened or continued after the negligence of the plaintiff had ceased.[11]

However, there is at least one class of cases in which it has been held that an injured person may recover by the application of the doctrine of last clear chance, notwithstanding his own negligence continues up to the very time of the injury. This class includes such cases as those involving railroad trespassers, where the engine driver or motorman actually possesses knowledge of the danger in which plaintiff is and has the power to prevent the accident and fails to take advantage thereof. In a recent Indiana case of this nature, [12] the Court instructed the jury that deceased was a trespasser on defendant's track and that they should find for the defendant unless they found that defendant's engineer discovered that the decedent was in a perilous position, and that he was unaware of such condition, and that such engineer made such discovery in time to have stopped or checked the train and avoided striking decedent. The instruction concluded as follows: "But, in case you find that said en-

11. Indianapolis Traction, etc., Co. *v.* Croly, 54 Ind. App., pg. 582.
12. Pennsylvania Co. *v.* Reesor (Ind. App.), 108 N. E. 983.

gineer, with ordinary care in the use of such means as were then at hand and under his control, and without endangering the train or the persons thereon, could have stopped said train, or checked the speed thereof so as to avoid striking said decedent then your verdict should be for the plaintiff." This instruction was objected to on the ground that it gave the jury to understand that the decedent was not obliged to use ordinary care, with which he is always chargeable in case of injury. In upholding the instruction the higher Court said: "As a general proposition, the statement of the law contended for by appellant is correct, but in the application of the doctrine of last clear chance the existence of the negligence of the party injured or his failure to exercise due care will not, in all cases, defeat a recovery. Although he failed to exercise due care, which continued up to the moment of his injury, if the evidence discloses that the engineer in charge of this train, applying the principle to this case, realized the danger of decedent, and knew that he was unconscious of his danger, and, so knowing and realizing failed to exercise ordinary care to avoid the injury, appellee (plaintiff) is entitled to recover." [13]

It has been urged, however, that the recovery allowed in such cases is not based on the doctrine of last clear chance but rather on the ground of a wanton and willful injury to which the decedent's negligence would be no defence. But a California Court thus disposes of the objection: "It is immaterial whether the liability of the defendant in such a case be based upon the theory that the negligence of the defendant, being the later negligence, is the sole proximate cause of the injury, or upon the theory that defendant has been guilty of willful and wanton negligence. In either case, the liability would exist, for, where an act is done willfully and wantonly, contributory negligence on the part of the injured person is no bar to a recovery." [14]

---

13. The court cites the following Indiana cases in support of its contention: Indianapolis Traction, etc., Co. *v.* Croly, 54 Ind. App., 566, 96 N. E. 973, 98 N. E. 1091; Chicago, etc., Ry. Co. *v.* Pritchard, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.), 857; Indianapolis Traction, etc., R. Co. *v.* Kidd, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143, 10 Ann. Cas. 942.

14. Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 74 Pac. 15, 63

However, an examination of the cases will illustrate the narrowness from a practical point of view, of the distinction between the doctrine of last clear chance and the rule that contributory negligence will not bar a recovery for a wanton and willful injury [15]

A class of cases where there is often an attempt to invoke the doctrine of last clear chance, arise, from accidents to pedestrians while crossing street car tracks. In many of these cases, it appears that the plaintiff without observing his surroundings, negligently goes upon the track or in such close proximity to it as to expose himself to the danger of injury from a passing car, and where there is nothing to prevent him from observing his danger and avoiding the accident at any time before it occurs, and where it also appears that the motorman, by reason of his negligence, did not see the plaintiff or his danger in time to avoid the injury. In discussing cases of this nature an Indiana Court said: [16] "In such a case, the negligence of the plaintiff is concurrent and not antecedent and the reason upon which the general rule is based cannot apply. If the want of care on the part of the plaintiff consists in a failure to discover his own danger, and if the want of care on the part of the defendant consists of a like failure to observe the dangerous situation of the plaintiff, and if such want of due care on the part of both continues until the injury occurs, or becomes so imminent that neither can prevent it, the plaintiff cannot recover. Under such circumstances, the opportunity of the plaintiff to observe the danger is equal to that of the defendant, and the duty to discover the danger and avoid the injury by the exercise of due care rests equally upon him and the defendant. If the opportunity of the plaintiff to avoid the injury was as late as that of the defendant, how can it be said that the defendant had the last clear chance of avoiding it? The test is, what wrongful

L. R. A. 238, 98 Am. St. 85. See also Esrey *v.* Southern Pac. R. Co., 103 Cal. 54, 37 Pac. 500; Herbert *v.* Southern Pac. R. Co., 121 Cal. 227, 53 Pac. 651; Everett *v.* Los Angeles, etc., R. Co., 115 Cal. 105, 125, 34 L. R. A. 350, 43 Pac. 207, 46 Pac. 889.

15. See Neary *v.* Northern P. R. Co., 37 Mont. 461, 97 Pac. 944, 19 L. R. A. (N. S.) 446.

16. Indianapolis Traction, etc., Co. *v.* Croly, 54 Ind. App. 560.

conduct occasioning the injury was in operation at the very moment it occurred, or became inevitable? If just before the climax, only one party had the power to prevent the injury, and he neglected to make use of it, the responsibility is his alone, but if each had the power to avoid said injury, and each failed to use it, then their negligence is concurrent, and neither can recover. In such a case, the negligence of the motorman in failing to keep a lookout in front of his car is the violation of the general duty which he owes to all persons making use of the street. He does not owe to the person negligently exposed to injury any special duty different from that owing to other travelers in the street, for the reason that he does not know prior to the injury that the situation of such person is such as to expose him to a particular danger. Such failure of the motorman to perform a general duty of this character is negligence, to which contributory negligence is a defence." [17]

A different question, however, arises in the exceptional case, when, by reason of intervening circumstances the original negligence of the plaintiff in getting into a position of peril is regarded as having culminated and ceased while it was still possible for defendant, by the exercise of due care, to have discovered the peril and averted the accident. In such cases, i. e., when the negligence of the defendant, in failing to discover the danger, continued as an efficient cause of the accident after the antecedent negligence of the plaintiff must be deemed to have ceased—the decided tendency, though there is a conflict on the subject, is toward the view that the failure of defendant to discover the danger is sufficient to sustain the doctrine, and that the actual discovery of the danger is not necessary, if, under the circumstances, there was a duty incumbent upon the defendant to dis-

17. As bearing on this question see Dyerson *v.* Union Pac. R. Co., 74 Kas. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132; French *v.* Grand Trunk, etc., R. Co., 76 Vt. 441, 58 Atl. 722; Butler *v.* Rockland, etc., R. R. Co., 99 Me. 149, 58 Atl. 775, 105 Am. St. 267; Green *v.* Los Angeles Terminal Ry. Co., 143 Cal. 71, 76 Pac. 719; 101 Am. St. 68; See note to Bogan *v.* Carolina C. R. Co., 55 L. R. A. 418 and footnote in Hammers *v.* Colorado Southern, N. O. & P. R. Co., 34 L. R. A. (N. S.) 685 and note to Bourrett *v.* Chicago & N. W. R. Co. (Iowa), 132 N. W. 973, 36 L. R. A. (N. S.) 957.

cover the danger and the performance of that duty would have enabled the defendant to avert the accident.[18]

It is very difficult in cases where the entire transaction covers but a very brief period to determine whether the defendant's negligence continued or intervened after the negligence of the plaintiff had culminated. This difficulty is well illustrated in a New York case [19] where the Court, divided four against three, and held that evidence tending to show that a street car might have been stopped within eight feet after it first struck a wagon crossing the track, but that it did not stop until it had shoved the wagon for at least 20 feet, the wagon being tipped over and the decedent thrown therefrom and killed, did not justify the submission of the case to the jury under the doctrine of last clear chance. The majority of the Court seems to have decided that it was impossible to attempt to divide such a transaction into fragments and impute one part of it to the negligence of both parties, and another part of the defendant's negligence alone. The dissenting judges took the view that a recovery should be had, basing their argument on the "humanitarian" doctrine. Justice Vann, who delivered the dissenting opinion said: "Can we say, as matter of law, that the motorman was justified in not stopping the car, when a human life was in such imminent peril and he could have stopped it in time to prevent the fatal result. Such a rule would be a reproach to jurisprudence and an encouragement to reckless conduct. As I understand it, our law is not subject to this imputation; but, on the other hand, the humane rule is in force that, notwithstanding, the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the defendant by the exercise of reasonable care and prudence, an action will be for the jury."

---

18. Ferguson *v.* Chicago, M. & St. P. R. Co., 100 Iowa 741, 69 N. W. 1028. See cases cited in decision in Bourrett *v.* Chicago & N. W. R. Co. (Iowa), 36 L. R. A. (N. S.) 957 and in note. See Teakle *v.* San Pedro, L. A. & S. L. R. Co. (Utah), 90 Pac. 409, 10 L. R. A. (N. S.) 486 and cases cited on question of actual discovery of peril not being necessary.

19. Rider *v.* Syracuse Rapid Transit Co., 171 N. Y. 139, 58 L. R. A. 125; 63 N. E. 836.

It would seem to be well settled that the plaintiff or decedent must have been in a situation of apparent and imminent danger for some appreciable time before the injury. In cases where the evidence is in conflict upon this point, or in cases where the undisputed evidence upon this question is of such a character that reasonable minds might draw opposite inferences, the question should be submitted to the jury under proper instructions from the court.[20]

Although it would be impossible to formulate rules that would cover all the state of facts that might arise, yet the following propositions might be stated for the guidance of the practitioner who wishes to know whether a case will come under the doctrine of the last clear chance.

1. Defendant must have owed plaintiff a special and particular duty, the violation of which can be treated as the sole proximate cause of the injury.

2. Such duty must arise some appreciable time before the injury occurs.

3. Defendant's opportunity of preventing the injury by the exercise of due care must be later in point of time than that of plaintiff.

4. If the negligence of both plaintiff and defendant are concurrent and continue up to the time of the accident, there can be no recovery under this doctrine unless defendant, prior to the time of the injury, saw and realized the danger of plaintiff and could have prevented it by the exercise of due care. The danger being unknown to plaintiff.[21]

Huntington, Indiana. SUMMER KENNER.

---

20. Wabash R. Co. *v.* Tippecanoe Loan & T. Co. (Ind. Supp.), 98 N. E. 64, 38 L. R. A. (N. S.) 1167 and note; Evansville, etc., Traction Co. *v.* Spiegel, 49 Ind. App. 412, 94 N. E. 718, 97 N. E. 949; note to Dyerson *v.* Union P. R. Co., 7 L. R. A. (N. S.) 133.

21. A full review of the many cases coming under this doctrine can be had by a study of the following cases with their exhaustive notes: Bogan *v.* Carolina C. R. Co., 55 L. R. A. 418; Dyerson *v.* Union Pac. R. Co., 7 L. R. A. (N. S.) 132 and note; Neary *v.* Northern P. R. Co., 37 Mont. 461, 19 L. R. A. (N. S.) 446; Hammers *v.* Colorado Southern, N. O. & P. R. Co., 34 L. R. A. (N. S.) 685; Bourrett *v.* Chicago and N. W. R. Co., 36 L. R. A. (N. S.) 957; Teakle *v.* San Pedro, L. A. & S. L. R. Co., 10 L. R. A. (N. S.) 486.